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Re: New Cassel/Hicksville Groundwater Contamination Superfund Site
Our File No. 7507-5

Dear Ms. Kivowitz and Ms. LaPoma:

As you are aware, we represent Vishay GSI, Inc. (VGSI), and on behalf of our client we hereby submit the following comments on the U.S. Environmental Protection Agency's (EPA's) July 23, 2014 proposed Settlement Agreement and Order on Consent for Remedial Design, Remedial Investigation/Feasibility Study, and Cost Recovery (Settlement Agreement) for Operable Unit 1 (OU-1) and Operable Unit 3 (OU-3) of the New Cassel/Hicksville Groundwater Contamination Superfund Site (Site) located in Nassau County, New York.

1. *OU-1 and OU-3 should not be combined or addressed together under the Settlement Agreement*

Addressing OU-1 and OU-3 under the same Settlement Agreement is inefficient and appears misplaced. OU-1 and OU-3 are in two entirely different phases of the remediation process. The remedial investigation/feasibility study (RI/FS) for OU-1 is completed and a remedy has been selected by EPA. EPA has determined that OU-1 is a "discrete" area immediately "downgradient of the NCIA." See OU-1 Record of Decision (ROD) Responsiveness Summary (p.2)(the ROD states that "[i]ndividual facilities within the NCIA are considered to be among the sources of groundwater contamination for OU-1"). Consistent with these statements, Appendix 3 of the Settlement Agreement clearly defines the geographical boundaries of OU-1, as well as identifying the three groundwater plumes that migrate into OU-1, all of which originate from source areas on the NCIA sites.

EPA also stated in the OU-1 Responsiveness Summary (p.2) that "EPA has coordinated with NYSDEC on the ongoing remedial measures that are in place, or expected to be in place, to address source areas and contamination within the NCIA itself and it is the EPA's expectation that this [NCIA source area] contamination will continue to be addressed under the NYSDEC State cleanup program." Stated another way, EPA and NYSDEC have identified the responsible parties of the source areas of contamination for OU-1 as being within the NCIA and, OU-1 is immediately downgradient of the NCIA with east/west boundaries identical to the NCIA. In short, the NCIA parities are the known responsible parties for OU-1.

In contrast, no RI/FS activities whatsoever have occurred in OU-3. EPA defined OU-3 very broadly as the "far field plume" which is shown in Appendix 4 to be located generally south and downgradient of OU-1. Only the northernmost boundary of OU-3 (which is the shared southern boundary of OU-1) is known. The term "far field" has not been defined. Appendix 4 of the Settle Agreement currently depicts OU-3 as any area outside of OU-1, which suggests that OU-3 is comprised of all contaminated groundwater that is not otherwise regarded as within OU-1.

Thus, while the NCIA parties are easily identifiable potentially responsible parties of OU-3, the absence of any east, west or southern boundaries to OU-3 means that any party that had a release of hazardous substances upgradient or cross-gradient to OU-1 may also be a potentially responsible party. That is, unless those releases are going to be addressed by EPA in a separate operable unit such as OU-2, for example. At this point, however, there is no way to make such a determination, and since the Site covers an approximate 6.5 mile area, EPA was grossly under-inclusive in choosing which parties were "selected" to receive the Settlement Agreement for purposes of OU-3. Thus, while there is some overlap in responsible parties between OU-1 and OU-3 (i.e., the NCIA parties), there is a high probability that the as-yet unidentified parties will far outnumber the currently limited number of identified recipients of the Settlement Agreement.

2. VGSI is not a potentially responsible party for OU-1

By addressing OU-1 and OU-3 together, EPA ignored that only certain parties may be responsible for the various operable units, whereas others may not be responsible at all. For instance, VGSI is not a source of contamination in OU-1. VGSI's potential responsibility for any contaminants in the groundwater in the area "identified" as OU-3 has not been established, and may also be dependent on how OU-3 (or OU-2) will be defined geographically. At this point, however, there is no basis to assign VGSI the status of a potentially responsible party in ether operable unit, but especially in OU-1.

Both the NYSDEC and EPA identified a specific group of parties responsible for impacts in OU-1 and EPA acknowledged in its OU-1 ROD that VGSI was excluded from this group. See OU-1 ROD, Responsiveness Summary (pp.4-5) (discussing the absence of contaminant markers for the former VGSI site). Specifically, EPA concluded that the contaminant marker 1,2-DCB has only been detected twice within OU-1 at a maximum concentration 1.1 parts per billion, which is well below the federal MCL of 600 parts per billion and below even New York State's more rigorous 3 parts per billion standard. VGSI, therefore, is not a contributor to groundwater contamination in OU-1.

3. VGSI's contribution to the Site is divisible

The Settlement Agreement incorrectly applies joint and several liability to all identified recipients. The harm (as acknowledged by EPA with its "OU" designations) is divisible geographically and by marker contaminants. Because VGSI has not contributed to groundwater contamination within OU-1, its liability for overall impacts to the Site (defined as OU-1, OU-2 and OU-3) is divisible, and the attempted imposition of joint and several liability in this context is inappropriate.

The imposition of joint and several liability under CERCLA can be avoided where a party can establish that there is a "reasonable basis" for harm at a site to be considered "divisible." See Burlington Northern & Santa Fe Railroad Co. v. U.S., 556 U.S. 599, 614–15 (2009). As courts in the Second Circuit have recognized, a key mechanism for establishing divisibility under CERCLA involves, among other things, establishing that "separate parties caused separate harms." See APL Co. Pte. Ltd. v. Kemira Water Solutions, Inc., 2014 WL 715631, No. 11-cv-1686, at ¶ 39 (S.D. NY, Feb. 25, 2014); Goodrich Corp. v. Town of Middlebury, 311 F.3d 154, 170 n.16 (2d Cir., 2002). Evidence to this effect must be "concrete and specific." See APL Co. Pte. Ltd., 2014 WL, at ¶42.

With respect to historic releases at the former VGSI site, there is concrete and specific evidence that VGSI caused separate and distinct harms from those identified by EPA in OU-1. As discussed above, EPA points to this evidence in its OU-1 ROD, in which it states that the contaminant markers associated with the contamination arising from VGSI's former site are not present within OU-1. *See* OU-1 ROD, Responsiveness Summary (pp. 4–5). For

just this reason, the contaminants historically released from VGSI's former site were not included within EPA's conceptual site model for OU-1.

4. EPA's proposed deadlines are unrealistic and compliance is impossible

Pursuant to the Settlement Agreement, Respondents are required to submit to the EPA both an OU-1 Work Plan for the design of Remedial Action for OU-1 and the Site Characterization Summary Report (SCSR) for OU-3 within thirty (30) days after the Effective Date of the Settlement Agreement (Effective Date). Not only are these deadlines unrealistic, it is not practically possible to comply with them. Moreover, EPA has already determined in the ROD that no imminent and substantial threat to human health exists as there is currently no exposure pathway for contaminated groundwater from OU-1 to reach any receptors (human or otherwise) (See ROD at pp. 14-15). In other words, there is no logical basis for these unduly strict deadlines.

Additionally, even assuming that pre-design investigation activities in OU-1 could be completed within the prescribed eighteen (18) month deadline, it is unrealistic to require a RI/FS for OU-3 be completed simultaneously within the same time-frame. For many years, VGSI has been conducting environmental investigation and remediation activities associated with its former site located at 600 West John Street in Hicksville, New York. VGSI is familiar with the complex and time consuming tasks of gathering and compiling data, analyzing data, completing studies, and organizing findings to present coherent and complete technical reports and/or work plans. In light of VGSI's experience with investigative and remedial activities, the proposed deadlines set forth in the EPA's Settlement Agreement and associated Statements of Work (SOW) are overly optimistic and unattainable.

5. The required financial assurance is excessive

For the Settlement Agreement to have any meaning, the parties to the agreement must actually be able to conduct the required work. Conducting remedial activities requires capital and the availability of credit. The proposed Financial Assurance is required to be provided - in addition to the payment of past and future response costs. The sizable Financial Assurance requirement of $6,000,000 will tie up funds (and credit facilities) needed to complete the work required under the Settlement Agreement.

6. The Stipulated Penalties are overly harsh and burdensome

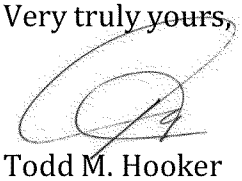
The Stipulated Penalties are too harsh, do not include any grace period or opportunity to cure any potential noncompliance, do not account for the severity or gravity of the infraction or offer any offset for minor infractions. Parties to the Settlement Agreement attempting to comply with the requirements set forth therein in good faith would already be shouldering large financial responsibilities. The imposition of penalties for a technical

or other minor violation is unseemly, especially since the only recourse is an internal EPA dispute resolution process. It would be more appropriate to offer a grace period or opportunity for parties to cure after receiving notice of the noncompliance. For these reasons, VGSI cannot and will not be in a position to agree with the imposition of the currently proposed Stipulated Penalties.

7. Natural Resource Damages

The State of New York serves as the natural resource trustee for groundwater, and to the extent that certain parties have reached agreement with the State on these issues, there should be no reservation of rights language for EPA to reserve that claim for the State or any other potential trustee. VGSI cannot and will not be in a position to agree with the reservation of rights with respect to natural resource damages.

Very truly yours,



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